

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH H. LEWIS, JR.

Plaintiffs

**No. 16-5874 - GEKP**

v.

UNIVERSITY OF PENNSYLVANIA

**CIVIL ACTION**

Defendant.

**BENCH MEMORANDUM OF DEFENDANT IN OPPOSITION TO PLAINTIFF'S  
REQUEST FOR A MIXED-MOTIVE INSTRUCTION TO THE JURY**

The jury should not be instructed on a mixed-motive theory under Title VII or the ADA because Plaintiff has not presented direct or circumstantial evidence of animus based on race or disability.

Whether to give a jury instruction based on mixed-motive, pretext, or both is a question of law for this Court to decide at the conclusion of all evidence. Gardner-Lozada v. SEPTA, No. 13-2755, 2015 U.S. Dist. LEXIS 96606, \*16 n.5 (E.D. Pa. July 24, 2015) (J. Pratter), aff'd 643 Fed. Appx. 196 (3d Cir. 2016). In order to obtain a mixed-motive instruction, Plaintiff must have presented evidence that an employment decision was based at least in part on animus toward a protected class. Id. A plaintiff requesting a mixed-motive instruction "has a high initial hurdle to clear" and must offer "stronger evidence" than is needed to establish a *prima facie* case under McDonnell Douglas. Campetti v. Career Educ. Corp., No. 02-cv-2003, 2003 U.S. Dist. LEXIS 12202, \*\*18-19 (E.D. Pa. June 25, 2003). Plaintiff has failed to meet this heightened evidentiary burden.

Plaintiff has attempted to present two pieces of evidence of purported animus. First, Plaintiff has presented a deposition statement by Maureen Rush, the Superintendent and Vice President of Public Safety, that she observed facial hair on Plaintiff, which “started off this whole disciplinary process.” (Plaintiff’s Trial Memorandum (doc. 61) at 4.) Second, Plaintiff has presented testimony of Plaintiff that he was repeatedly told to shave his beard. This evidence does not reflect any animus towards African Americans or people with disabilities. There is no protected class for people who are Black and bearded.

For the foregoing reasons, Defendant, The Trustees of the University of Pennsylvania, respectfully requests that this Court deny Plaintiff’s request for a mixed-motive jury instruction and instead instruct the jury on pretext pursuant to the Third Circuit’s Model Instructions 5.1.2 (Title VII) and 9.1.2 (ADA).

Dated: July 11, 2018

Respectfully submitted,

**TUCKER LAW GROUP, LLC**

/s/ Joe H. Tucker, Jr.

Joe H. Tucker, Jr., Esquire  
Ten Penn Center  
1801 Market Street, Suite 2500  
Philadelphia, PA 19103  
(215) 875-0609  
Attorneys for Defendant, The Trustees of  
the University of Pennsylvania

**CERTIFICATE OF SERVICE**

I, Joe H. Tucker, Esquire, hereby certify that on July 11, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

**TUCKER LAW GROUP, LLC**

Dated: July 11, 2018

/s/ Joe H. Tucker

Joe H. Tucker, Esquire